IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 705 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KN MATWANI

Versus

Kandla Port Trust

Mr. Y.N.Oza advocate for the petitioner.
Mr. S.R.Brahmbhatt for the respondents

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 10/07/2001

ORAL JUDGEMENT

By means of this petition, the petitioner has sought for quashing the orders dated 7.11.86, 12/13th March, 1987 and 21st November, 1986 passed by the respondents.

2. The petitioner was appointed as a junior

clerk by the Secretary to the Development Commissioner, Kandla Port Project. The Kandla Port Project was previously under Ministry of Transport and then Kandla Port Project was converted into Kandla Port Trust and that Trust was taken over by the Central Government by an order dated 29.2.1964 on coming into force of Major Port Trusts Act, 1963. The service conditions of the employees were to be governed by the Central Government rules, but lateron regulations were framed by the Central Government and those condtiions were made applicable to the employees of the Trust. The petitioner was promoted to the post of Assistant by the Chief Mechanical Engineer in the month of December, 1975. The Chief Mechanical Engineer of the Trust passed the order retiring the petitioner prematurely by an order dated 7.11.1986 at the age of 52 years and lateron the order passed for cancellation of the quarter which was allotetd to the petitioner in service tenure and that order was passed on 26th November, 1986 which has also been challenged. The petitioner filed an appeal before the Chairman of the Kandla Port Trust. The appeal was dismissed by an order dated 12/13th March, 1987. The petitioner has challenged the said orders in this petition.

3. Affidavits have been exchanged. I have heard the learned advocates for the parties and perused the relevant record.

4. The contention of the learned counsel for the petitioner is that the compulsory retirement order could have been passed at the age of 55 years by an appropriate authority and not at the age of 52 years. It is submitted that fundamental rule-56(b)(i) requires that a ministerial servant (who is not governed by sub-clause (ii) may be required to retire at the age of 55 years but should ordinarily be retained in service, if he continues to be efficient upto the age of 60 years. He must not be retained after that age except in very special circumstances which must be recorded in writing and with sanction of the local Government. Therefore, in view of the above provision, the question of premature retirement of the petitioner does not arise and the order passed by the authority retiring the petitioner at the age of 52 years is absolutely illegal, arbitrary and in violation of the relevant rules and regulations and the executive order of the Central Government in terms of Article 162 of the Constitution of India read with section 29(i)(b)(f) of the Major Port Trust Act, 1963.

5. The learned counsel for the respondents contended that the fundamental rules are not applicable

to the service conditions of the employees of the Kandla Port Trust as Kandla Port Trust Employees (Retirement) Regulations 1978 were framed with the approval of the Central Government and those regulations are applicable to the condtiions of the Kandla Port Trust employees. The learned counsel for the respondents brought to the notice of the court the relevant provisions of Regulation 4(e)(i) of Kandla Port Employees (Retirement) Regulations, 1978 (for short hereinafter referred to as "Regulations") which reads as under:

"(e) Notwithstanding anything contained in these Regulations the appropriate authority shall if it is of the opinion that it is in the public interst to do so, have the absolute right to retire an employee of the Board by giving him notice of not less than 3 months in writing or 3 months' pay and allowances in lieu of such notice-

(i) at any time, after an employee has completed 30 years' qualifying service".

Thus, according to the learned counsel for the respondents, the fundamental rules as referred to by the learned counsel for the petitioner are not applicable to the service conditions of the Kandla Port Trust.

6. I have considered the contentions of the learned counsel for the parties. In this respect, it appears that as soon as the Kandla Port Project was converted into Kandla Port Trust under the provisions of Major Port Trust Act, 1963, at that time, the Trust was taken over by the Central Government. In absence of any regulation framed by the Trust, the fundamental rights applicable to the Central Government employees were applicable. Lateron under the authority of Major Port Trust Act, 1963, the Trust has framed regulations with the approval of the Central Government and under regulation 4(e)(i) of the Regulations, an employee could be prematurely retired after completing qualifying service of 30 years. It is not mentioned that at the time when 30 years' qualifying service is completed, an employee must be more than 50 years or of any age. But the relevant fact is that an employee has completed 30 years qualifying service, he could be prematurely retired after following the procedure prescribed therefor. Thus, I do not find any substance in the contention of the learned counsel for the petitioner in this behalf.

7. The next contention of the learned counsel for the petitioner is that the impugned order of

prematurely retiring the petitioner was passed by the Chief Mechanical Engineer who is not an appointing authority. Hence, this order is vitiated. According to the learned counsel for the petitioner, the petitioner was appointed by the Development Commissioner and so, the Chairman of the Trust will be deemed to be an appointing authority. Therefore, the order is vitiated as having been not passed by the appropriate authority. I have considered the contention of the learned counsel for the petitioner. But I do not find any force in this contention also inasmuch as Regulation 3(i)(f) defines appropriate authority who is empowered to make substantial appointment. In the present case, the petitioner was appointed as a junior clerk and he was promoted to the post of Assistant and he remained to be a class III employee. As per Regulation 7 of the Kandla Port Employees (Classification, Control and Appeal) Regulations, 1964, the appointing authority in respect of posts have been specified in the schedule attached to the aforesaid regulations. In respect of class III the schedule specifies Head of Department as the appointing authority. The Chief Mechanical Engineer is a head of department. The petitioner was a class III employee and therefore, the Chief Mechanical Engineer was the appointing authority and was within the definition of "appropriate authority".

8. The next contention of the learned counsel for the petitioner is that the compulsory retirement of the petitioner does not come within the purview of "public interest" as he was only an assistant and he was not dealing with public and/or has committed no act which is injurious to public and the order is vitiated on this account. It is also submitetd that the petitioner has been prematurely retired on the ground of adverse remarks in respect of temperament of the petitioner. The Division Bench of this Court has observed that " unless it has been reached by the disciplinary to the conclusion that having regard to the contention and magintude of the fault committed by the employee concerned, it would be absolutely unsafe to retain him in service. The maximum penalty of throwing him out of job would be an act vitiated by the principles of natural justice required to be followed by the authority, but the proposition of law enunciated by the Division Bench of this Court in the case of Siddharth Mohanlal Sharma vs. South Gujarat University reported in 23(1) GLR, 233 is not applicable to the facts of the present case inasmuch as that rule is in respect of the punishment awarded in disciplinary inquiry. In this case, there is no question of disciplinary inquiry nor

order has been passed under any departmental proceedings. The order has been passed on the basis of adverse remarks in service record of the petitioner. It says that the temperament of the petitioner from the year 1977 till 1984 was not good and it says that the temperament of the petitioner in the year 1977 to 1978 was excited as mentioned in the service book. In the year 1980, the relations with colleagues not helpful. In the year 1982, the temperament has been shown as not amicable and the relations with colleagues not to the mark. In 1983 the temperament is shown as hot. The relations with collelagues not cordial. Amenability to discipline is found to be poor. In 1984, the temperament is found hot. The relations with colleagues is quarrelsome and not good with colleagues. The amenability to discipline is poor.

9. The learned counsel for the respondents referred the decision of this Court in the case of J.M.Shah vs. State of Gujarat and others reported in 200(3) G.L.H., 151 wherein it has been observed as under:

> "The court does not propose to deal with the aforesaid authorities for the simple reason that now the issue is concluded by the later decisions of the Supreme Court in AIR 1992, SC, 1020, AIR 1994, SC, 1261 and 1994, SC, 1261 and also in AIR 1998, SC, 1661."

In the case of State of Punjab vs.Gurdas Singh etc. reported in AIR 1998, SC, 1661, after undertaking a review of the previous decisions, the Apex Court has held that before taking the decision to retire the government servant prematurely, the authorities are required to consider the whole record of service. Any adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during whole of his tenure of service whether it is in public interest to retain him in the service. The whole record of service of the employee will include any uncommunicated adverse entries as well.

The contention of the learned counsel for the petitioner is that only adverse remarks have been considered which are relating to the temperament of the petitioner and they are not in respect of the integrity of the petitioner or insufficiency of discharge of the duty. As such, those remarks cannot be treated as sufficient material for passing the impugned order of prematurely retiring the petitioner. I have considered

the contention of the learned counsel for the petitioner. In the case of Union of India vs. J.N.Sinha and others reported in AIR 1971, SC, 40, the Supreme Court has settled the proposition of law which reads as under:

> "The right conferred on the appropriate authority is an absolute one. That power can be exercised subject to the condition mentioned in the rule, one of which is that the concerned authority must be of the opinion that it is in public interest to do so. If that authority bona fide forms that opinion the correctness of that opinion cannot be challenged before courts. It is open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that is an arbitrary decision."

In view of the rule laid down by the Supreme Court, the order of premature retirement cannot be challenged. However, this Court cannot consider sufficiency of the material for passing the impugned order. In the present case, on the basis of the material produced before this Court, it appears that there is sufficient material for passing the impugned order. It cannot be said that there is no sufficent material for passing the impugned order. As such, this Court cannot go behind the order to look into the matter whether this temperament of the petitioner comes within the purview of the public interest or not. Even grading given in the adverse remarks to the petitioner is "poor". The authority is required to consider the overall performance of the petitioner when the order was passed. It appears from the material on record that the authority concerned has taken into account the entire material regarding overall performance of the petitioner. It cannot also be said that the order was passed malafide because not of good terms of the petitioner with the Chief Mechanical Engineer. As there is sufficient evidence and material on record for passing the impugned order, I do not find any substance in the contention of the learned counsel for the petitioner.

10. In the last, the learned counsel for the petitioner submitted that the petitioner has not been paid the pay and allowance for three months in lieu of the notice. In this respect, the learned counsel for the respondents showed the conduct of the petitioner and submitted that the petitioner has never deposited the cheque in the bank, otherwise the petitioner would have received the cheque back with an endorsement that the

cheque cannot be encashed due to non-matching of signature of the person concerned or any other reason. As such, in the facts and circumstances of the case, it appears that the petitioner has not presented the cheque which was sent alongwith the impugned order, before the bank for payment of pay and allowances for three months in lieu of the notice. However, it is clear that the petitioner has not received that amount due to fault on his part, but he is entitled for the same. This Court in the facts and circumstances of the case, directs the petitioner to present the original cheque received by him before the respondent concerned for issuance of fresh cheque of the amount mentioned in the original cheque, in case the petitioner is not in possession of the original cheque and the respondents will pay that amount to the petitioner within two weeks from the date of the presentation of the attested copy of the cheque, provided the petitioner has already not encashed the cheque issued by the respondents. The order is not vitiated due to non-payment of three months' pay and allowances in lieu of the notice as the respondents have already paid that amount by way of a cheque, but the petitioner has voluntarily not encashed that cheque and hence the order would not be vitiated on this account.

11. In view of the above, this petition deserves to be dismissed and is accordingly hereby dismissed. Rule is discharged with no order as to costs. However, the respondents are directed to pay the amount of cheque which was given to the petitioner with impugned order, within two weeks from the date of the presentation of the certified copy of this judgment, if the petitioner has not already encashed that cheque, the petitioner is required to present the original cheque for issuance of fresh cheque. In case, he has lost the same he will file an application before the respondent concerned. The respondents are at liberty to verify and ascertain from the bank whether that cheque has been encashed or not and if not, then only the respondents will pay that amount to the petitioner.

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